PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Daniel P. Mitchell,
Petitioner

v.

United States of America
Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Defendant Daniel P. Mitchell's conviction on retrial for false declaration in a bankruptcy, in violation of 18 USC 152(3), violated double jeopardy or fundamental fairness, where the jury in the first trial found the declarations were not material, a necessary element of the offense.

Rule 14.1(b) Disclosure

All parties are shown in the caption.

Rule 14.1(d) Citations

US v Daniel P. Mitchell, 528 F.3d 1034 (8th Cir. 2008)
US v Daniel P. Mitchell, 2007WL 2316684 (N.D. Iowa)
US v Daniel P. Mitchell, 476 F.3d 539 (8th Cir. 2007)
US v Daniel P. Mitchell, 2006 WL 20583 (N.D. Iowa)

Rule 14.1 (e) Statement of the Basis for Jurisdiction

The Eighth Circuit Court of Appeals affirmed the conviction on June 10, 2008. The order denying Petition for Rehearing was filed on July 30, 2008. Jurisdiction is based on 28 USC 1254. Notification has been served per Supreme Court Rule 29.4(a).

Rule 14.1(h) Constitutional Provision

Constitution of the United States, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Mitchell was charged in a two-count indictment for concealment of assets, 18 U.S.C. 152(1), specifically the ownership of a business and income, and false declarations, 18 U.S.C. 152(3), specifically the ownership of a business, income and debt payments.

Mitchell was first tried on August 29-31, 2006. The manner of submission of specifications was initially proposed by the Government in its Supplemental Proposed Jury Instructions, filed August 17, 2005. The Government's proposed instructions asked the jury to separately determine whether Defendant was "not guilty" or "guilty" with respect to each count, and then to indicate which specifications "the jury unanimously agrees" were established.

The Trial Court's verdict form adopted the Government's proposal of finding "not guilty" or "guilty" on each count, followed by an identification of the specifications supporting any guilty verdict. The Trial Court modified the language proposed by the Government, and instructed the jury to put a check mark for each specification, the jury "unanimously find beyond a reasonable doubt" Mitchell concealed or made. (App. pp. 7-10)

During the first trial the Court believed materiality would not be an element of the 18 U.S.C. 152(3) false declaration count. (App. pp. 15-19) However, the Court propounded to the jury questions on materiality, following the false declaration specifications. Specifically the jury was asked to "unanimously find beyond a reasonable doubt" whether any of the statements were material. If the

jury checked "yes," it would then answer subsequent questions as to which declarations were material. (App. pp. 10-11) The obvious and sole purpose for posing the materiality questions was to avoid a new trial in the event Defendant Mitchell was found guilty of one or more specifications of false declaration in the event it was later determined materiality was a necessary element of false declaration.

The jury returned its verdict August 31, 2005. The jury found Mitchell guilty on Count 1 and checked the specification for "income" but not "business ownership." The jury returned a verdict finding Mitchell guilty of "false declaration" and checked the specifications on "income" and "debt payments," but not "business ownership." The jury checked "No" with respect to whether any representations were material, and therefore did not answer the final question

concerning which specifications were material. (App. p. 10)

The Trial Court considered the jury's failure to check "business ownership " as an acquittal of that specification of concealment under 18 U.S.C. 152(1) under Count 1. (App. p. 36) The conviction of Mitchell for concealment based on the "income" specification was set aside on appeal. (App. pp. 65-73) Mitchell stands acquitted of the Count I concealment charge. The Government has never argued, and the Trial Court has never stated, that the language used in the concealment specifications would authorize a retrial of Mitchell for concealment of the business.

The Trial Court's January 4, 2006 Order on post-trial motions denied Mitchell's Motion for Judgment of Acquittal, but, finding materiality a required element of false declaration, sua sponte,

ordered a new trial for Mitchell on Count 2. (App. pp. 15-20, 42-61)

Mitchell appealed the concealment conviction. Mitchell also filed a Motion to Dismiss the false declaration count on double jeopardy grounds, and appealed the Court's denial of the Motion to Dismiss. The two appeals were consolidated. The Court of Appeals set aside the Count I concealment of income conviction and affirmed the failure to dismiss the Count II false declaration charge. United States v. Mitchell, 476 F.3d 539 (8th Cir. 2007). (App. pp. 65-73)

On retrial the Government took the position the Court of Appeals' decision allowed retrial of the materiality element as well as the "business ownership" specification. Mitchell objected, citing authority that verdicts are to be construed as unanimous and that retrial would violate fundamental

fairness. The Trial Court agreed with the Government's position.

In the retrial the Court modified the manner of submission. Rather than request a finding of "guilty" or "not guilty," followed by specifications, and have the jury find "guilty" or "not guilty" separately, as to each specification, the Court instructed as the three specifications in Instruction No. 13. (App. pp. 74-78)

During and after the retrial, Mitchell moved for judgment of acquittal. Mitchell raised a number of grounds, including the consequences of the prior verdicts on materiality.

The second jury returned a verdict on May 2, 2007 and found Mitchell guilty of false declaration under all three specifications. The Court denied Mitchell's post-trial Motion for Judgment of Acquittal.

He was sentenced on August 30, 2007 to one year in prison. (App. pp. 82-96)

Jurisdiction of the trial court existed under 18 U.S.C. 3231.

Legal Argument

During Mitchell's first trial for false declarations in bankruptcy, the Trial Court was uncertain whether materiality remained an element of 18 U.S.C. 153(3). To avoid a retrial, the Trial Court had the jury answer questions whether any of the false declaration specifications were material. The jury in the first trial answered "No" to the question whether any of the declarations were material. (App. p.10)

On Mitchell's post-trial motions, the Trial Court determined materiality was a necessary element of an 18 U.S.C. 153(3) claim, but denied Mitchell's motion for judgment of acquittal and granted, sua sponte, a new trial. (Mitchell asked for a new trial on other grounds, but only asked for judgment of acquittal based on the answer to the question on materiality.) Based on the language of the materiality questions,

the Trial Court reasoned the "no" answer did not necessarily mean the jury unanimously found the declarations were not material, but could mean the jury did not unanimously find the declarations were material. (App. pp. 61-63)

A general unanimity instruction was given. (App. pp. 5-6) A general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of their guilty verdict. United States v. Lyons, 453 F.3d 1222, 1224 (9th Cir. 2006), amended 472 F.3d 1055, 1068 (9th Cir. 2007); United States v. Kim, 196 F.3d 1079, 1082 (9th Cir. 1999). United States v. Lucas, 932 F.2d 1210, 1220-1 (8th Cir. 1991), recognized the fact an instruction could conceivably permit a jury to reach a non-unanimous verdict is not sufficient to require reversal when the jury has been

instructed that it must reach a unanimous verdict. *See* also Fryer v. Nix, 775 F.2d 979, 992 (8th Cir. 1985).

Notwithstanding the general unanimity instruction, the Trial Court denied the Motion for Judgment of Acquittal, instead ordered a new trial, and then later denied Mitchell's Motion to Dismiss based on double jeopardy. (App. p. 63) The Court interpreted the answer to the materiality question as not necessarily evidencing unanimity on the part of the jury, notwithstanding the fact that the identical language was used with respect to the specifications for the companion count of fraudulent concealment under 18 U.S.C. 152(1). (App. pp. 7-8) Under that count, the jury found only one of two specifications was proven. The conviction on that specification was set aside on the first appeal. However, no one disputes

Mitchell stands acquitted of both specifications of the 18 U.S.C. 152(1) fraudulent concealment count.

When the Court of Appeals in the first appeal set aside the fraudulent concealment count, it also affirmed the Trial Court's denial of Mitchell's Motion to Dismiss the 18 U.S.C. 152(3) false declaration count on double jeopardy grounds. (App. p.65)

On retrial, Mitchell was convicted of the false declaration count. (App. p. 81) On the second appeal Mitchell argued, inter alia, the conviction violated double jeopardy and fundamental fairness given the materiality findings in the first trial. The opinion of the Court of Appeals in the second appeal makes clear it felt the result of the first appeal controlled the double jeopardy claim. (App. p. 96) The opinion in the second appeal did not directly address the separate fundamental fairness argument.

Mitchell believes the circumstances make his case appropriate for a grant of certiorari consistent with the standards set forth in U. S. Supreme Court Rule 10. Given the presumption of unanimity, Mitchell should have been acquitted of false declaration following the first trial. Upholding the conviction for false declaration following the second trial does not merely violate double jeopardy. Mitchell believes it is a violation of fundamental fairness to refuse to find an acquittal by interpreting a submission that would allow affirmative response to a question to provide a basis to sustain a conviction, but would allow the Government an opportunity to retry the Defendant in the event of a negative response to the question. Mitchell's conviction constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the

supervisory power of the United States Supreme Court. Cf. Fundamental fairness involves a determination whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions. Dowling v. United States, 493 U.S. 342, 353, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). This Court should review this conviction. Doing so will provide clarity with respect to the effect of verdicts based on multiple specifications, an accepted procedure which is becoming more common. United States v. Stewart, 433 F.3d 273, 287-8 (2nd Cir. 2006).

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APPENDIX

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Instruction No. 14

Count 1 of the Indictment, charging the defendant with knowing and fraudulent concealment of properly belonging to his bankruptcy estate alleges that two specific things that were knowingly and fraudulently concealed or caused to be concealed by the defendant: (1) defendant's ownership interest in Wood Floors Imports; and, (2) defendant's total income from January 1, 1999, through about July 11, 2000.

The government is not required to prove that *both* of the things alleged in Count 1 of the Indictment were concealed.

Each juror must agree with each of the other jurors, however, that the same thing alleged in Count 1 as being knowingly and fraudulently concealed, or caused to be concealed, by the defendant was, in fact, concealed. In order to convict, the jury must unanimously agree upon at least one of the things alleged to have been knowingly and fraudulently concealed by the defendant.

Instruction No. 15

The crime of making a false declaration in a bankruptcy petition, as charged in Count 2, has four essential elements, which are:

One, between about July 12, 2000, and continuing through to about October 12, 2000, a bankruptcy case was pending in the United States Bankruptcy Court for the Northern District of Iowa, in which the defendant was the Debtor;

Two, the defendant made one or more false declarations, certificates, verifications and statements regarding a matter, in relation to the bankruptcy proceeding;

Three, the defendant knew the declaration, certificate, verification and statement was false when it was made;

Four, the defendant did so with the intent to defraud.

The term "debtor" means the person or corporation for whom a bankruptcy case has been commenced.

To act with "intent to defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss to another or

bringing about a financial gain to oneself or another, to the detriment of a third party.

If you unanimously find the government has proven all of these essential elements beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under Count 2; otherwise you must find the defendant not guilty of the crime charged under Count 2.

Instruction No. 16

Count 2 of the Indictment, charging the defendant with knowingly and fraudulently submitting a false declaration, certificate, verification and statement under penalty of perjury, alleges that the defendant made one or more false or fraudulent representations regarding: (1) defendant's ownership interest in Wood Floors Imports; (2) Defendant's total income from January 1, 1999, through about July 11, 2000; and, (3) debt payments made on behalf of the defendant by Wood Floors Imports on an unsecured F&M loan.

The government is not required to prove that all of the representations that are alleged in Count 2 of the Indictment as false are, in fact, false.

Each juror must agree with each of the other jurors, however, that the same representation alleged in Count 2 to be false or fraudulent is, in fact, false or fraudulent. The jury need not unanimously agree on each such representation alleged, but, in order to convict, must unanimously agree upon at least one such statement as false or fraudulent when knowingly made or used by defendant.

Instruction No. 22

In conducting your deliberations and returning your verdicts, there are certain rules you must follow. I shall list those rules for you now.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict—whether guilty or not guilty—must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it

is right, or simply to reach a verdict.

Third, if the defendant is found guilty, the sentence to be imposed is my responsibility. You may not consider punishment in any way in deciding whether the government has proved its case beyond a reasonable doubt.

Fourth, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in writing or orally in open court. Remember that you should not tell anyone—including me—how your votes stand numerically.

Finally, your verdicts must be based solely on the evidence and on the law which I have given to you in my instructions. Each verdict, whether guilty or not guilty, must be unanimous. Nothing I have said or done is intended to suggest what your verdicts should be—that is entirely for you to decide.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	) No. CR 05-0050-LRR
Plaintiff,	)
vs.	) VERDICT FORM) COUNT I
DANIEL P. MITCHELL,	)
Defendant.	)

We, the Jury, make the following findings on the questions put to us regarding Count 1 of the Indictment:

Question 1: We, the Jury, unanimously find beyond a reasonable doubt the defendant, Daniel P. Mitchell, "Guilty" of the crime of fraudulent concealment of assets, as charged in Count 1 of the Indictment.

Note: If you unanimously find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this Verdict Form and answer Question 2 in this verdict form. If you unanimously find the defendant not guilty of the above charge, have your foreperson write "not

guilty" in the above blank space, sign and date this Verdict Form and proceed to Verdict Form - Count 2.

Question 2: Please place a check mark (V) before the information that you unanimously find beyond a reasonable doubt that the Defendant concealed (please check all that apply):

_____ Defendant's ownership in WoodFloors Imports

__√__ Defendant's total income from January 1, 1999, through about July 11, 2000

/s_____
FOREPERSON

8/31/05____
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	) No.CR 05-0050-LRR
Plaintiff,	)
vs.	) VERDICT FORM
-	) COUNT 2
DANIEL P. MITCHELL,	)
Defendant.	)

We, the Jury, make the following findings on the questions put to us regarding Count 2 of the Indictment:

Question 1: We, the Jury, unanimously find beyond a reasonable doubt the defendant, Daniel P. Mitchell, "Guilty" of knowingly and fraudulently submitting false declaration, certificate, ver cation and statement under penalty of perjury, in or in relation to a bankruptcy proceeding, as charged in Count 2 of the Indictment.

Note: If you unanimously find the defendant guilty of the above crime, have your foreperson write "guilty" in the above blank space, sign and date this Verdict Form and answer Question 2, 3 and 4 in this verdict form.

If you unanimously find the defendant not guilty of the above charge, have your foreperson write

"not guilty" in the above blank space, sign and date this Verdict Form and proceed to Verdict Form.

Question 2: Please place a check mark (√) before the information that you unanimously find beyond a reasonable doubt that the Defendant concealed (please check all that apply):

_____ Defendant's ownership interest in WoodFloors Imports

__√__ Defendant's total income from January 1, 1999, through about July 11, 2000

__√__ Debt payments made on behalf of Defendant by Wood Floors Imports on an unsecured F&M loan.

/s_____
FOREPERSON

8/31/05__
DATE

Question 3: Do you unanimously find beyond a reasonable doubt that one or more of the false declarations, certificate, verification and statement under penalty of perjury were "material" matters, that is, had a natural tendency to influence, or were capable of influencing, the outcome of the bankruptcy proceeding?

____Yes __√___ No

If your answer to Question 3 is "Yes" please answer Question 4.

Question 4: Please place a check mark (√) before one or more of the false declarations, certificate, verification and statement that you unanimously find beyond a reasonable doubt that were material to the outcome of the bankruptcy proceeding please check all that apply):

_____ Defendant's ownership interest in Wood Floors Imports

_____ Defendant's total income from January 1, 1999, through about July 11, 2000

_____ Debt payments made on behalf of Defendant by Wood Floors Imports on an unsecured F&M loan.

/s
FOREPERSON

8/31/05
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. CR 05-0050-LRR
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
DANIEL P. MITCHELL,	)	
	)	
Defendant.	)	

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I. INTRODUCTION

Before the court is Defendant Daniel P. Mitchell's Motion for Judgment of Acquittal or For New Trial ("Motion") (docket no. 49).

II. PROCEDURAL BACKGROUND

On May 19, 2005, a grand jury charged Defendant in a two-count Indictment. Both counts concerned Defendant's conduct in a voluntary Chapter 7 bankruptcy proceeding he filed in 2000.

Count 1 charged Defendant with fraudulent concealment of assets in connection with a bankruptcy proceeding in violation of 18 U.S.C. § 152(1). Count 1 alleged that Defendant knowingly and fraudulently concealed from creditors and trustees (1) his ownership interest in Wood Floors Import Distributor, L.C., d/b/a WFI Bamboo ("WFI Bamboo") and (2) his total income from January 1, 1999, through about July 11, 2000.

Count 2 charged Defendant with making a material false declaration, certificate, verification, and statement, under penalty of perjury as permitted under 28 U.S.C. § 1746, in and in relation to his voluntary bankruptcy petition, in violation of 18 U.S.C. § 152(3). Count 2 alleged that Defendant submitted his bankruptcy petition under penalty of perjury and knowingly and fraudulently failed to disclose (1) his ownership interest in WFI Bamboo, (2) his total income from January 1, 1999, through about July 11, 2000, and (3) debt payments WFI Bamboo made on Defendant's behalf.

During this prosecution, and up until the close of the government's case-in-chief, the government and Defendant proceeded as if materiality were an element of Count 2. With respect to Count 2, the Eighth Circuit Court of Appeals has held that 18 U.S.C. § 152(3)

requires the government to prove Defendant's false statements concerned a material matter, i.e., a matter that has a natural tendency to influence, or is capable of influencing, the outcome of the bankruptcy proceeding. See United States v. Yagow, 953 F.2d 427, 432 n.2 ("Although 18 U.S.C. § 152 does not expressly require that the false verification be made with regard to a material matter, the courts have imposed such a requirement." (citing United States v. O'Donnell, 539 F.2d 1233, 1237 (9th Cir. 1976)); see also Kungys v. United States, 485 U.S. 759, 770 (1988) (defining materiality). In the Indictment, the government accused Defendant of making false statements "that were material to his voluntary bankruptcy petition." The government proposed jury instructions to the court before trial that required that the false declaration concern a material matter. In its opening statement to

the jury, the government indicated it would prove the Defendant's false statements were material. Both parties questioned the government's witnesses about the materiality of Defendant's alleged false statements.

The Eighth Circuit Model Criminal Jury Instructions, however, indicate that it is presently an open question whether materiality is an element of 18 U.S.C. § 152(3). See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, 6.18.152B, at 139 n.1 (2005) ["Model Instructions"] ("There is some question as to whether materiality is an element of the offense of bankruptcy fraud."). The openness of the question stems from the fact that the Supreme Court decided United States v. Wells, 519 U.S. 482 (1997), after the Eighth Circuit Court of Appeals decided Yagow. Id. Wells has brought the validity of Yagow into question. Id.; see also United

States v. Watts, No. 96-4787, 1998 WL 398740, *2-*3 (4th Cir. July 8, 1998) (recognizing potential impact of Wells on Yagow but not reaching question of whether 18 U.S.C. § 152(3) still requires materiality) (unpublished); 1 Collier on Bankruptcy ¶ 7.02, at 1-7 (15th rev. ed. 2004) ["Collier"] ("Courts have not yet addressed the unique issues that are raised by section 152(3). . . . [T]he materiality requirement remains uncertain.").

After the close of the government's evidence, Defendant moved for a judgment of acquittal. Defendant argued that there was insufficient evidence to prove he committed the crimes charged in the Indictment. In part, Defendant argued the government had not presented evidence of materiality to support Count 2 of the Indictment.

The court ruled materiality is not an element of 18 U.S.C. § 152(3) and denied Defendant's motion for judgment of acquittal. The court predicted that the

Eighth Circuit Court of Appeals would overrule Yagow and hold that materiality is not an element of 18 U.S.C. § 152(3). The court decided, however, to submit a special interrogatory to the jury regarding the materiality of Defendant's statements.

From August 29 to August 31, 2005, the court held a jury trial. The jury found Defendant guilty of both counts of the Indictment. On Count 1, the jury found Defendant fraudulently concealed his income, but did not fraudulently conceal an ownership interest in WFI Bamboo. On Count 2, the jury found Defendant knowingly and fraudulently made false statements in his bankruptcy petition about his income and debt payments, but did not fail to disclose an ownership interest in WFI Bamboo.

In response to the special interrogatory on Count 2, the jury stated it did not unanimously find that Defendant's statements were material. On the verdict form for Count 2, the court asked the jury: "Do you unanimously find beyond a reasonable doubt that one or more of the false declarations, certificate[s], verification[s] and statement[s] under penalty of

perjury were 'material' matters, that is, had a natural tendency to influence, or were capable of influencing, the outcome of the bankruptcy proceeding?" The jury answered "No."

On September 7, 2005, Defendant filed the instant Motion. On September 20, 2005, the government filed a Resistance. The court held a hearing on the Motion on December 5, 2005. Defendant was personally present with his attorney Stanley Roush. Assistant United States Attorney Ian Thornhill represented the government.

III. TRIAL EVIDENCE

Defendant filed a voluntary petition for Chapter 7 bankruptcy on July 12, 2000. In the Statement of Financial Affairs portion of his petition, Defendant declared, under penalty of perjury, [1] that (1) he did not hold any interest or offices in any businesses,

[1] "I declare under penalty of perjury that I have read the foregoing answers contained in the Statement of Financial Affairs and any attachments thereto and that they are true and correct."

[2] (2) no payments exceeding $600 were made toward any of his debts within the 90 days preceding the filing of his bankruptcy petition, [3] and (3) he had no income from employment in 1999 or 2000.[4] In Schedule I of his petition, however, Defendant stated he was receiving $1000 gross pay per month from WFI Bamboo, with an estimated net monthly take home pay of $800 per month. Defendant verified the accuracy of his petition under oath at a "341 Meeting of Creditors" on August 7, 2000.

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[2]Question 16 required Defendant to:

> [L]ist the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation . . . within the two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

Defendant answered "None."

A. Ownership of WFI Bamboo

At trial, the government presented evidence that, contrary to his bankruptcy petition, Defendant owned WFI Bamboo in 2000. Although Defendant produced WFI Bamboo meeting minutes that indicated Defendant transferred all of his interest in the business to his wife in 1998, the government contended the purported 1998 transaction was a sham

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[3]Question 3 required Defendant to "[l]ist all payments on loans . . . aggregating more than $600 to any creditor, made within 90 days immediately preceding the commencement of this case." Defendant answered "None."

[4]Question 1 required Defendant to "[s]tate the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the two years immediately preceding this calendar year." Defendant listed $0 for 1999 and 2000; he listed $60,000 for 1998.

that Defendant concocted after the fact to shield his assets from creditors and trustees. The government maintained the transfer did not take place until 2000, and, therefore, Defendant should have disclosed his ownership of WFI Bamboo in his bankruptcy petition.

WFI Bamboo's corporate attorney, Nicolas Abou-Assaly, testified Defendant and his wife did not send Abou-Assaly the meeting minutes until March 2000. Abou-Assaly also testified that Defendant had called him twice in 1999 to tell him that Defendant wanted Defendant's wife to have all of his interest in WFI Bamboo, but on neither occasion mentioned the minutes documenting the alleged 1998 transfer.

The jury also heard a recording of Defendant testifying under oath in another bankruptcy hearing ("Hearing") in March 2003. WFI Bamboo had filed for bankruptcy; Defendant was attempting to gain control of WFI Bamboo's inventory. At the Hearing, Defendant stated:

> I feel as an owner, I've never lost that position. Just because a piece of paper

takes it away from me does not change the fact that I started this, I ran it, I put 65 hours a week in this company.

A bankruptcy trustee testified Defendant admitted to her in January 2003 that he founded the company in 1998 and transferred WFI Bamboo to his wife in 2000. The trustee also testified Defendant said he was the president of WFI Bamboo until he was fired in October 2002. Defendant admitted at the Hearing that, although though he wrote "laborer" on his schedule, he was president and CEO of WFI Bamboo when he signed his petition in July 2000.

Defendant maintained that he divested himself of WFI Bamboo in 1998. For example, Defendant's wife's 1998 tax return showed she owned 75% of WFI Bamboo, the ownership share the government attributed to Defendant. WFI Bamboo's 2000 tax return indicated that no change in ownership took place during 2000. The tax returns upon which Defendant relied, however, were not prepared until 2000 and 2002, respectively. Also, WFI Bamboo's 1998 tax return did not indicate a change in ownership.

On cross-examination, defense witness Tom Towne testified that Defendant was "president" of WFI Bamboo in late 2002. Towne also testified Defendant did not cancel insurance for WFI Bamboo, which was taken out under Defendant's social security number, until 2002.

B. Income/Debt Payments

The government also presented evidence to show WFI Bamboo (1) made payments between February and July 2000 on a personal loan Defendant incurred with his ex-father-in-law at F&M Bank and (2) made payments in 1999 and 2000 on a truck Defendant owned. The government contended these debt payments constituted income that Defendant was illegally attempting to shield from his creditors. Defendant was not, as alleged in his petition, a "laborer" at WFI Bamboo making $1000 per month; instead, Defendant was the owner of WFI Bamboo, hiding his true salary through the debt payments scheme.

The record contains evidence that WFI Bamboo made payments on a personal loan Defendant had with F&M Bank (account # 200099152). The government presented evidence of the following debt payments on the F&M loan:

> February 28, 2000: Check # 2063, signed by Defendant, from WFI Bamboo to F&M Bank for $963.91; entire amount applied to loan account # 200099152.
>
> March 23, 2000: Check # 068680 from South Slope Cooperative Communication Company to WFI Bamboo for $116.92, signed over to F&M Bank; entire amount applied to loan account # 200099152.
>
> March 27, 2000: Check # 2097, signed by Defendant, from
>
> WFI Bamboo to F&M Bank for $6700; $2000 applied to loan account # 200099152.
>
> May 2, 2000: Check # 2151, signed by Defendant, from WFI Bamboo to F&M

Bank for $6500; $1900 applied to loan account # 200099152.

May 25, 2000: Check # 2203 from WFI Bamboo to F&M Bank for $6700; $2000 applied to loan account # 200099152.

July 6, 2000: Check # 2268, signed by Defendant, from WFI Bamboo to F&M Bank for $6700; $2000 applied to loan account # 200099152.

July 27, 2000: Check # 2328, signed by Defendant, from WFI Bamboo to F&M Bagk for $5000; $2000 applied to loan account # 200099152.

At the Hearing, Defendant testified under oath that the debt payments were income. When asked by the trustee if the debt payments were "like income to you?," Defendant replied: "Of course." Defendant personally signed at least five of the seven debt-payment checks on behalf of WFI Bamboo. Defendant presented a handwritten note to the trustee in

advance of the Hearing. The noted stated: "Being the . . . starter of the Co. . . . [$]425.00 take home every two weeks[?] Ha! Ha!" Also, a sticky note was attached to a payment schedule on the F&M Bank loan. The payment schedule listed payments from March 27, 2000, to October 7, 2002. Defendant wrote on the sticky note: "Payments on loan line of credit. Since 3-27-2000. This was income to Dan. Not a loan from [WFI Bamboo] to pay a loan." At the Hearing, Defendant testified he was receiving approximately $2000 each month in debt payments in 2000.

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[5] The July 27, 2000 debt payment was made after Defendant filed his petition. The government introduced the July 27, 2000 debt payment to show a pattern of activity and did not contend that Defendant was required to disclose it on his bankruptcy petition.

The record also contains evidence that WFI Bamboo made payments on a 1997 Ford F-150 truck Defendant owned. The government presented evidence of the following debt payments on the truck:

September 24, 1999: Check # 1752, signed by Defendant, from WFI Bamboo to Ford Credit for $700.

November 1, 1999: Check # 1834, not signed by Defendant, from WFI Bamboo to Ford Credit for $1500.

January 14, 2000: Check # 1962, signed by Defendant, from WFI Bamboo to Ford Credit for $1500.

February 24, 2000: Check # 2044, signed by Defendant, from WFI Bamboo to Ford Credit for $1500.

July 31, 2000: Check # 2337, signeg by Defendant, from WFI Bamboo to Ford Credit for $1500.

Defendant also handed the trustee a copy of WFI Bamboo's Schedule of Personal Property

("Schedule"). The Schedule listed a 1997 Ford F-150 truck. Defendant claimed he owned the truck, not WFI Bamboo. Defendant wrote: "Dan's personal. Transferred to [my son on] Oct[ober] 18[, 2002.]" Defendant also gave the trustee a copy of the truck's title. The truck was titled to Defendant until October 17, 2002, when he transferred it to his son. Attached to the Schedule and the title was another sticky note. Defendant wrote on the note: "Proof of ownership of truck. Dan bought truck in Summer of 97 and has always been in his name till now. Gave to my son. 10-17-02."

[6] The July 31, 2000 debt payment was made after Defendant filed his petition. The government introduced the July 27, 2000 debt payment to show a pattern of activity and did not contend that Defendant was required to disclose it on his bankruptcy petition.

IV. PRINCIPLES OF REVIEW

Defendant moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 and, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33.

A. Motion for Judgment of Acquittal

Rule 29 provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Such a motion is permitted after trial, in which case the court may set aside the verdict and enter a judgment of acquittal. Fed. R. Crim. P. 29(c). It is well settled, however, that "[j]ury verdicts are not lightly overturned." United States v. Stroh, 176 F.3d 439, 440 (8th Cir. 1999). The court must view the evidence in the light most favorable to the government and give the government the benefit of all reasonable inferences. United States v. Surratt, 172 F.3d 559, 563 (8th Cir. 1999). The court must uphold the jury's verdict so long as "a reasonable-minded jury could

have found [Defendant] guilty beyond a reasonable doubt." United States v. Hayes, 391 F.3d 958, 961 (8th Cir. 2004). It is not the province of the court to weigh the evidence or evaluate the credibility of witnesses. Id. Those tasks are for the jury. Id.

B. Motion for New Trial

Rule 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if justice so requires." Fed. R. Crim. P. 33(a). A district court is granted broad discretion in considering a motion for a new trial. See United States v. Wilkins, 139 F.3d 603, 604 (8th Cir. 1998). A district court may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." United States v. Campos, 306 F.3d 577, 579 (8th Cir. 2002) (citation omitted). However, "[u]nless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand." Id. (citing United States v. Lacey, 219 F.3d 779, 783 (8th Cir. 2000)); see also Ortega v. United States, 270 F.3d 540, 547 (8th Cir. 2001) (noting a district court may

grant a new trial under Rule 33 "only if the evidence weighs heavily enough against the verdict that a miscarriage of justice may have occurred").

A district court enjoys more latitude in granting new trials under Rule 33 than in granting motions for judgment of acquittal under Rule 29; however, "[m]otions for new trials based on the weight of the evidence are generally disfavored." Campos, 306 F.3d at 579. District courts "must exercise the Rule 33 authority 'sparingly and with caution." Id. (quoting United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980)).

V. THE MERITS

In the instant motion, Defendant raises a number of arguments. The court considers these arguments separately with respect to each count on which Defendant was convicted. A. Count 1: Concealment (18 U.S.C. § 152(1))

The jury convicted Defendant of concealment of assets in Count 1—a violation of 18 U.S.C. § 152(1), which states:

A person who . . . knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor . . . shall be fined under this title, imprisoned not more than 5 years, or both. 18 U. S. C. § 152(1). In support of his Motion, Defendant claims there was insufficient evidence presented at trial to sustain his conviction. He also claims the court erred in failing to instruct on the advice of counsel.

1. Sufficiency of the Evidence

Defendant contends that the government failed to prove the debt payments were Defendant's income and thus part of the bankruptcy estate. Defendant claims the evidence showed the payments were made by a third party, WFI Bamboo. Because he claims his wife owned WFI Bamboo, Defendant argues the United States Trustee would have had no authority to recover WFI Bamboo's payments. Defendant

maintains he did not violate the law knowingly or fraudulently.

a. Rule 29

Viewing the evidence in the light most favorable to the government and giving the government the benefit of all reasonable inferences, see Surratt, 172 F.3d at 563, the court concludes there is sufficient evidence in the record to sustain a conviction on Count 1. As the court instructed the jury, the commencement of a bankruptcy case creates a bankruptcy estate. 11 U. S. C. § 541(a)(1). The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case. " Id. The estate also includes all " [p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." Id. § 541(a)(6).

It is clear that the jury could have found that Defendant owned WFI Bamboo, a part of the bankruptcy estate, and then furtively covered up that

ownership—devising a sham transaction with his wife to escape his creditors. The jury could have further found Defendant was president of WFI Bamboo, not its laborer. The jury could have found Defendant supplemented his official income of $1000 per month with periodic payments on his personal loans. The jury could have construed Defendant's statements at the Hearing as admissions that he knew these payments were income. Together, this conduct could be reasonably construed as evidence Defendant knowingly and fraudulently concealed his income in his bankruptcy proceeding.

The court recognizes that the foregoing analysis is inconsistent with the jury's verdict in one respect: namely, the fact the jury acquitted Defendant of fraudulently concealing his ownership interest in WFI Bamboo. From this, Defendant apparently concludes the jury found that he did not own WFI Bamboo. It is well established, however, that inconsistent verdicts in the same indictment as to the same defendant are unobjectionable. United States v. Powell, 469 U.S. 57, 62-63 (1984); United States v. Morton, 412 F.3d 901,

904 (8th Cir. 2005); United States v. Fuller, 374 F.3d 617, 623 (8th Cir. 2004), cert. denied, 125 S. Ct. 926 (2005). The court cannot and need not guess which aspect of the jury's verdict reflects its true conclusions. Fuller, 374 U.S. at 623 (citing Dunn v. United States, 284 U.S. 390, 393-94 (1932) (Holmes, J.)). The inconsistency may also be the result of confusion or lenity. Id. The court, therefore, shall not speculate on what the jury might have been thinking, but instead simply inquire into the sufficiency of the evidence on the aspects of the charge of which Defendant was convicted. Id. As indicated, the evidence is clearly sufficient.

Even if ownership of WFI Bamboo were uncertain, the Eighth Circuit Court of Appeals has stated that "a debtor's duty to disclose assets extends to all property that may be found to be property of the bankruptcy estate." United States v. Novak, 217 F.3d 566, 577 (8th Cir. 2000) (emphasis added). "It is a reasonable reading of 18 U.S.C. § 152 to conclude that the statute requires a debtor to disclose the existence of assets whose immediate status in bankruptcy is

uncertain." Id. Even in the face of uncertainty, Defendant was required to disclose the debt payments made by WFI Bamboo, "so that their legal status could be determined by the bankruptcy court." Id.

In sum, the court finds "a reasonable-minded jury could have found [Defendant] guilty beyond a reasonable doubt." Hayes, 391 F.3d at 961. Therefore, Defendant's motion for judgment of acquittal lacks merit with respect to Count 1.

b. Rule 33

The court also concludes a new trial is not warranted under Rule 33 on Count 1. As the foregoing discussion of Defendant's Rule 29 motion shows, the evidence supports the verdict. The court also concludes no miscarriage of justice occurred here. The court therefore declines to grant Defendant a new trial. See Lacey, 219 F.3d at 783 ("Unless the district court ultimately determines that a miscarriage of justice will occur, the jury's verdict must be allowed to stand.").

2. Advice of Counsel

At trial, Defendant requested a jury instruction regarding advice of counsel Over the government's objection, the court instructed the jury as follows:

One of the issues is whether defendant acted in good faith. Good faith is a complete defense to the charges of fraudulent concealment of assets and fraudulent submission of false declarations, certificate, verification and statement if it is inconsistent with intent to defraud which is an essential element of the charges. One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent. Evidence that defendant acted in good faith may be considered by you, together with all the other evidence, in determining whether or not he acted with the intent to defraud.

Final Jury Instruction No. 19. This instruction was modeled on Model Instruction 9.08, but Defendant contended the instruction did not go far enough. Defendant asked the court to also instruct the jury on the advice of counsel in accordance with Model Instruction 9.08, Note on Use (2)(d). Note on Use (2)(d) states, in part, that:

Defendant would not be acting with intent to defraud if, before taking any action with regard to the alleged offense, he consulted in good faith an attorney whom he considered competent, and for the purpose of securing advice on the lawfulness of his possible future conduct made a full and accurate report to that attorney of all material facts of which he had the means of knowledge, and then acted strictly in accordance with the advice given to him by that attorney.

Model Instruction 9.08, Note on Use (2)(d), at 469-70 (citing United States v. Ploundniak, 657 F.2d 948, 958-59 (8th Cir. 1981)). Defendant contends a new trial is warranted pursuant to Rule 33 because the court refused to give the jury this instruction.

Defendant claims the attorney who represented him in his bankruptcy, Michael Mollman, provided him with advice about his petition, which he strictly followed. Defendant claims Mr. Mollman told him he had to show some income on his petition. Defendant claims that, but for Mollman's advice, he would not have listed $1000 per month in income from WFI Bamboo on Schedule I of his petition.

The court rejects Defendant's argument and concludes it correctly declined to give Defendant's proffered instruction on the advice of counsel The government did not charge Defendant with disclosing income he did not earn; rather, the government accused Defendant of failing to report income Defendant earned in the form of debt payments in excess of $1000 per month. On cross-examination, Mr. Mollman testified he never advised Defendant that Defendant did not have to list income received in the form of debt payments. There is thus no evidence in the record to warrant Defendant's requested jury instruction. Cf. United States v. Barney, 674 F.2d 729, 731-32 (8th Cir. 1982) (concluding advice of counsel

instruction not warranted where "no evidence [Defendant] attempted in good faith to seek competent legal advice from any attorney"). Accordingly, the advice of counsel instruction was correctly omitted from the final instructions and a new trial is not warranted. See, e.g., United States v. Parker, 267 F.3d 839, 843-44 (8th Cir. 2001) (declining to grant new trial).

B. Count 2: False Declaration (18 U.S.C. § 152(3))

In Count 2, Defendant was convicted of making a false declaration under penalty of perjury, in violation of 18 U.S.C. § 152(3), which states:

A person who . . . knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11 . . . shall be fined under this title, imprisoned not more than 5 years, or both.

18 U. S. C. § 152(3). [7] The thorny question in this case is whether materiality is an element of the

statute. That is, must the government prove Defendant's false statement had a natural tendency to influence, or was capable of influencing, the outcome of the bankruptcy proceeding?

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[7]Title 28, United States Code Section 1746 states:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form. "I declare under penalty of perjury that the foregoing is true and correct . . . . "28 U.S.C. § 1746(2).

In the instant Motion, Defendant reasserts his argument that 18 U.S.C. § 152(3) requires materiality. Defendant maintains any false statement was not material because Defendant owed nearly $100,000 in back-taxes and penalties. Defendant claims that any failure to disclose the debt payments (which he characterizes as amounting to around $6000) as income was immaterial because the amount allegedly concealed was less than $100,000; because the federal and state taxing authorities had first priority in the bankruptcy estate assets, Defendant claims his creditors were not harmed and therefore the false statements could not have affected the outcome of the bankruptcy proceeding.

In the alternative, Defendant claims the court violated his due process rights when it effectively changed the crime charged in the Indictment in the middle of trial. See, e.g., United States v. Johnston, 353 F.3d 617, 623 (8th Cir. 2003) (holding constructive amendment of indictment is reversible error per se); see also United States v. Griffin, 215 F.3d 866, 868-69 (8th Cir. 2001) ("A jury instruction constructively

amends an indictment if it modifies the essential elements of the offense charged in the indictment."). The Defendant also claims it is unfair that he should bear the burden of an appeal when current Eighth Circuit Court of Appeals precedent is in his favor. Defendant claims the government should bear the burden of appeal, because it is the party seeking to overturn precedent.

The court now concludes Wells is distinguishable, and, therefore, materiality remains an element of 18 U.S.C. § 152(3), pursuant to Yagow. Accordingly, the court shall grant Defendant's motion for new trial with respect to Count 2 of the Indictment.

1. United States v. Wells

In Wells, the Supreme Court considered whether materiality was an element of 18 U. S . C . § 1014, which states:

Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action [of a federally insured bank] upon any application, advance, . .commitment, or loan . . . shall be fined not

more than $1,000,000 or imprisoned not more than 30 years, or both. 18 U.S.C. § 1014.

To determine whether the statute required materiality, the Court adopted a three-part test.

First, the Supreme Court examined the text of the statute. Wells, 519 U.S. at 490. The Court noted that the statute does not, on its face, require materiality. Id. To the contrary, it criminalizes "any" false statement. Id.

Second, the Supreme Court examined the common-law meaning of the terms in the statute. The Court recognized it "presume[s] that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate. " Id. at 491 (citations and internal quotation marks omitted). The Court noted that there was no showing that the term "false statement" had a settled meaning at common law, let alone one requiring materiality. Id.

Third, the Supreme Court examined the legislative history of 18 U.S.C. § 1014. Id. at 492. The legislative history confirmed the Court's conclusion that the statute did not require materiality. Id. The court determined Congress enacted 18 U. S. C. § 1014 as part of a general recodification of the criminal code. Id. The new criminal code included other provisions involving false representations that expressly required materiality. Id. at 492-94. It also determined 18 U.S.C. § 1014 consolidated thirteen statutes concerning false representations. Id. Ten of the thirteen statutes 18 U.S.C. § 1014 brought together did not contain a materiality requirement before recodification; three of the thirteen contained express materiality requirements before recodification. Id. at 493. "The most likely inference," the Court concluded, "is that Congress deliberately dropped the term `materiality' without intending materiality to be an element of § 1014." Id. The Court also presumed Congress was aware of one of the Court's prior decisions, in which it held that a similarly worded statute did not require

materiality. Id. at 495 (citing Kay v. United States, 303 U.S. 1, 5-6 (1938)).

2. Analysis

Applying the Wells analysis to the present case, the court concludes 18 U.S.C. § 152(3) requires materiality.

Statutory Text

The court begins its analysis with the text of the statute. Wells, 519 U.S. at 490. As in Wells, the text of 18 U.S.C. § 152(3) does not explicitly state materiality is required. To the contrary, the statute criminalizes "a" false declaration, certificate, verification, or statement under penalty of perjury. The use of the article "a" in 18 U.S.C. § 152(3) is nearly as broad as the use of the word "any" in 18 U.S.C. § 1014. In both instances, Congress did not specify that the false statement needs to be material. By contrast, another section of the same statute expressly requires materiality. See 18 U.S.C. § 152(5) (prohibiting "knowingly and fraudulently receiv[ing] any material amount of property from a debtor after the filing of a

case under title 11, with intent to defeat the provisions of title 11").

Common Law Terms

The court next turns to the examine the common-law meaning of the terms in 18 U.S.C. § 152(3). Unlike the statute at issue in Wells, there are two terms in 18 U.S.C. § 152(3)—"fraudulently" and "under penalty of perjury"— that, taken together, indicate materiality is required.

First, 18 U.S.C. § 152(3) does not simply criminalize false statements "knowingly" made like the statute at issue in Wells; the government must also prove those statements were made "fraudulently." In Neder v. United States, 527 U.S. 1, 20-21 (1999), the Supreme Court, applying the Wells framework, held that the use of the term "fraudulent" in the mail fraud, wire fraud and bank fraud statutes showed Congress intended to require proof of materiality. See 18 U. S . C . §§ 1341 (mail fraud), 1343 (wire fraud) and 1344 (bank fraud). The Court reasoned that "actionable 'fraud' had a well-settled meaning at common law";

"'fraud' required a misrepresentation or concealment of material fact." Neder, 527 U.S. at 22 (emphasis in original). "Indeed, . . . the common law could not have conceived of 'fraud' without proof of materiality." Id. (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 579 (1996); Restatement (Second) of Torts § 538 (1977); Smith v. Richards, 13 Pet. 26, 39 (U.S. 1839) and 1 J. Story, Commentaries on Equity Jurisprudence § 195 (10th ed. 1870)). Because the statutes used the term "fraudulent," the Court "presume[d] that Congress intended to incorporate materiality 'unless the statute otherwise dictates." Id. at 23 (emphasis in original) (quoting Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 322 (1992)). The same analysis appears to apply with equal force in the case at bar; the use of the term "fraudulently" in 18 U.S.C. § 152(3) is evidence that materiality is required. Cf. Aronofsky v. Bostian, 133 F.2d 290, 292 (8th Cir. 1943) (equating the "knowingly and fradulently" language of what is now 18 U.S.C. § 152(2) as requiring the government to prove "all the elements involved in perjury at common law, namely an intentional untruth in a matter material to an issue

which is itself material.") (citing Willoughby v. Jamison, 103 F.2d 821, 823 (8th Cir. 1939)).

Second, 18 U.S.C. § 152(3), unlike the statute at issue in Wells, also requires that the false statement be made "under penalty of perjury." 18 U.S.C. § 152(3). Like fraud, perjury required materiality at common law. See, e.g., id. at 292; People v. Teal, 89 N.E. 1086, 1087 (N.Y. 1909) ("From time immemorial the common law has made the materiality of false testimony an essential ingredient of the crime of perjury. "); see also

Johnson v. United States, 520 U.S. 461, 465 (1997) (recognizing that the federal perjury statute, 18 U.S.C. § 1623, expressly requires proof of a "false material declaration" under oath). On account of the use of the loaded common law phrase "under penalty of perjury" in 18 U. S. C. § 152(3), the court must presume materiality is required. Neder, 527 U.S. at 22.

The question, then, is whether there is anything in 18 U.S.C. § 152(3) that "dictates otherwise." Id. As in Neder, the court cannot find anything in the statute

that dictates otherwise. Id. Therefore, the court concludes the statute requires materiality, in spite of the fact that Congress did not expressly require materiality. Id.

c. Legislative History

The legislative history of 18 U. S. C. § 152(3) also indicates materiality is an element of the offense. The statute was enacted in 1976 as part of Public Law 94-550. Pub. L. 94-550, 90 Stat. 2534, 1976 HR 15531 (approved October 18, 1976). The House Committee on the Judiciary stated that "[t]he purpose of [Public Law 94-500] is to permit the use in Federal proceedings of unsworn declarations given under penalty of perjury in lieu of affidavits." H.R. Rep. No. 94-1616. At the time, oaths were required in a variety of proceedings, resulting in great inconvenience and heavy reliance upon notaries. Id. The legislation was designed to provide a convenient alternative to affidavits and sworn documents, by simply "permit[ting] the signer to subscribe to a document that expressly provides that it is being executed subject to the penalties of perjury . . . . " Id. It is clear, however, that Congress contemplated

that penalties of perjury would still apply; although the legislation dispensed with the formality of the oath, the substance and consequences remained the same. It stands to reason that Congress did not intend to drop the materiality requirement. Public Law 94-550 simply supplemented the existing bankruptcy statute, which criminalizes "knowingly and fraudulently mak[ing] a false oath or account" in a bankruptcy case.

8Although the Neder court did not engage in the last prong of the Wells analysis, for the sake of completeness, the court will do so anyway.

See 18 U.S.C. § 152(2); see also United States v. Cutter, 313 F.3d 1, 4 n.4 (1st Cir. 2002) (concluding 18 U.S.C. § 152(2) requires materiality); United States v. Lindholm, 24 F.3d 1078, 1082-83 (9th Cir. 1994) (same); Meer v. United States, 235 F.2d 65, 67 (10th Cir. 1956) (interpreting identical predecessor to 18 U.S.C. § 152(2) to require materiality and stating that "Congress did not intend to make it an offense to make a false statement in a bankruptcy proceeding, where such statement involved matters extraneous to such

proceeding and not material to the inquiry or the issue presented"); Aronofsky, 133 F.2d at 292 (similar); In re Slocum, 22 F.2d 282, 285 (2d Cir. 1927) ("The words of the statute requiring that the testimony be given 'knowingly and fraudulently' mean no more than 'an intentional untruth in a matter material to the issue which is itself material.'").

This analysis of the legislative history of the statute is consistent with the opinion of a leading bankruptcy law treatise. Collier writes:

[T]he materiality requirement was a judicial addition to section 152(2), and was well in place before the 1976 addition of section 152(3). Congress did not choose to add a materiality requirement to section 152(3) in 1976, thus raising the question of what Congress intended.

Arguments exist on both sides . . . .

The better argument is that Congress intended to carry over the materiality requirement. . . . [I]t seems reasonable to view section 152(3) as a mere extension of section 152(2), complete with section

152(2)'s unstated materiality requirement. This construction would also have the effect of reducing strategic behavior by reducing the differences between the two subsections to that of the form of testimony or statement at issue.

Collier ¶ 7.02, at 1-7. That is, "[s]ection 152(3) is patterned after section 152(2) [and] extends the sanction for giving false testimony to those situations in which a formal oath is not administered, but in which [28 U.S.C. § 1746] permits instead a declaration, certificate, verification or other statement." Id.

The government points out that Public Law 94-550 permitted unsworn declarations in a number of statutes other than 18 U.S.C. § 152, including the general perjury statute, 18 U.S.C. § 1621, and the military justice perjury statute, 10 U.S.C. § 931. The government argues that the court should infer from the fact that the oath provisions of these perjury statutes, unlike 18 U.S.C. § 152(2), expressly contained a materiality requirement before they were amended, Congress intended that 18 U.S.C. § 152(3)

would not contain a materiality element. This argument is unconvincing. The Judiciary Committee report expressly states that Section 4 of Public Law 94-550, the section of the legislation that enacted 18 U.S.C. § 152(3), was intended to amend "a specific perjury statute in the same manner as section 2 amends the general perjury statute." H.R. No. 941616. It therefore stands to reason that nothing in Section 4 was specially designed to remove a materiality requirement from 18 U.S.C. § 152. At the very least, there is nothing in the legislative history of the statute that "dictates" that the court set aside the presumption, which arises from Congress' use of loaded common law terms such as "fraudulently" and "under the penalty of perjury," that Congress intended to incorporate materiality into 18 U.S.C. § 152(3). See Neder, 527 U.S. at 23.

For the foregoing reasons, the court determines 18 U.S.C. § 152(3) requires the government to prove materiality. The court's decision is consistent with several leading interpretations of the statute. Collier ¶ 7.02, at 1-7; 2 Kevin F. O'Malley et al., Federal Jury

Practice & Instructions, § 26.07, at 132-33 (5th ed. 2000) (requiring materiality); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Instruction No. 3 (2003) (discussing Wells and Neder and concluding materiality is still required in 18 U.S.C. § 152(4)) (reprinted in Sand et al., Modern Federal Jury Instructions (Criminal), at 11-53 (2005) ["Sand"]); Pattern Criminal Jury Instructions for the Seventh Circuit, Instruction for 18 U.S.C. § 152(2) and (3): False Oath, False Declaration Under Penalty of Perjury—Elements (1998) (reprinted in Sand at 7-85) (requiring materiality without discussion). At least two post-Wells courts, which, although they have not discussed the impact of Wells, have also concluded materiality is required to prove a violation of Section 152(3). See, e.g., United States v. Gellene, 182 F.3d 578, 586 n.12, 587-88 (7th Cir. 1999); United States v. O'Connor, 158 F. Supp. 2d 697, 727 (E.D. Va. 2001). The court also recognizes that whenever there is a grievous ambiguity or uncertainty in the structure of a statute, it must apply the rule of lenity and resolve all doubt in favor of Defendant. See United States v.

Chipps, 410 F.3d 438, 448 (8th Cir. 2005); United States v. Clawson, 408 F.3d 556, 558-59 (8th Cir. 2005). [9]

[9] The court notes its conclusion is consistent with long-standing interpretations of an analogous bankruptcy statute, 11 U.S.C. § 727(a)(4)(A), which provides that the bankruptcy court shall not grant the debtor a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." 11 U.S.C. § 727(a)(4)(A). See In re Wills, 243 B.R. 58, 62 n.3 (9th Cir. B.A.P. 1999) (recognizing similarities between 18 U.S.C. § 152 and 11 U.S.C. § 727 and using one to interpret the other). Section 727 "clearly extends" to documents filed under penalty of perjury. In re Arcuri, 116 B.R. 873, 880 (Bankr. S.D.N.Y. 1990) (citing H. Sommer, Consumer Bankruptcy Law & Practice § 14.2.2.3 (3d ed. 1988) and B. Weintraub & A. Resnick, Bankruptcy Law Manual ¶ 3.03[4][a] at 3-9-10 (2d ed. 1986)), abrogated on other grounds in Grogan v. Garner, 498 U.S. 279, 286 (1991)). Courts have held that materiality must be shown for denying a debtor discharge. See, e.g., In re Bren, 122 Fed. Appx. 285, 286 (8th Cir. B.A.P. 2005) (unpublished disposition) ("A false oath bars discharge in bankruptcy if it is both material and made with an intent to defraud. "); Mertz v.

Rott, 955 F.2d 596, 598 (8th Cir. 1992) ("For such a false oath or account to bar a discharge, the false statement must be 'material. "); Bauman v. Feist, 107 F. 83, 85 (8th Cir. 1901) ("Plainly, the false oath contemplated . . . must be one material to the proceedings in bankruptcy.").

Intent to Defraud

The government argues that even if materiality is an element of 18 U. S. C. § 152(3), a new trial is not required because the jury implicitly found Defendant's false statements were material. First, the government points out that the court instructed the jury that it was required to find "intent to defraud" as an element of the offense. The Eighth Circuit Court of Appeals has held that the district court's failure to give a specific, separate materiality instruction was harmless because elsewhere the instructions "included [the] concept" of materiality. See Hays v. Hoffman, 325 F.3d 982, 992 (8th Cir. 2003).

There a number of problems with the government's argument. The jury instructions defined

"intent to defraud" as "to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss to another or bringing about a financial gain to oneself or another, to the detriment of a third party." This does not "include the concept of materiality," i.e., having a natural tendency to influence, or being capable of influencing, the decision of the decisionmaking body to which it was addressed. Kungys, 485 U.S. at 770. Indeed, the proof is in the proverbial pudding: here, when the jury was specifically asked in a special interrogatory whether Defendant's false statements were material, the jury was unable to unanimously answer "Yes." Therefore, there was not an implicit finding of materiality, as the government argues.

Disposition

In light of the error in the jury instructions, the court concludes the jury's verdict on Count 2 cannot stand. Defendant is entitled to a new trial pursuant to Rule 33 because the jury did not find Defendant committed all of the elements of the crime; the court concludes a miscarriage of justice would occur should

the jury's verdict stand. See Campos, 306 F.3d at 579; see also United States v. Gaudin, 515 U.S. 506, 511 (1995) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; [the defendant] therefore had a right to have the jury decide materiality.").

Defendant also appears to argue that if the court were to decide materiality were an element of Count 2, he is entitled to a judgment of acquittal pursuant to Rule 29. To the extent this claim is based on the sufficiency of the evidence, the court concludes there is sufficient evidence in the record from which a reasonable jury could have found materiality. A reasonable jury could have found Defendant's false statements on his bankruptcy petition had a natural tendency to influence, or were capable of influencing, the outcome of the bankruptcy proceeding.

In determining that a new trial is warranted on Count 2, the court is cognizant of the Fifth Amendment's double jeopardy clause and the doctrine

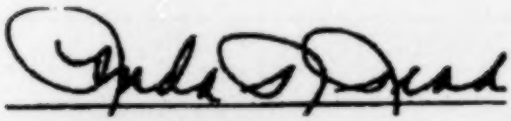
of collateral estoppel. Cf. Ashe v. Swenson, 397 U.S. 436, 443 (1970) (holding that "[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."). Here, the jury indicated in its answer to the special interrogatory that it could not unanimously find that Defendant's false statements were material. However, the jury's answer to the special interrogatory does not amount to a finding that Defendant's statements were immaterial. The jury merely indicated it could not unanimously find that Defendant's statements were material; the court would have to speculate to infer from this answer that the jury unanimously found the Defendant's statements were immaterial. Collateral estoppel and double jeopardy "bar[] relitigation between the same parties of issues actually determined at a previous trial." Simpson v. Florida, 403 U.S. 384, 385 (1971) (emphasis added, citations and internal quotation marks omitted). The jury did not actually determine that Defendant's false statements were immaterial to his bankruptcy

proceeding, and thus acquittal is not warranted. Id.; see also United States v. Console, 13 F.3d 641, 664-65 (3d Cir. 1993) (opining in dicta that "even if the district court had submitted the requested special interrogatories to the jury and the jury had indicated that certain predicate acts had not been established, [defendant's] reprosecution . . . based on these predicate acts would not have violated his double jeopardy rights"). Therefore, the court concludes Defendant may stand trial again on Count 2, despite the jury's answer to the special interrogatory.

VI. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Daniel P. Mitchell's Motion for Judgment of Acquittal or For New Trial (docket no. 49) is DENIED IN PART AND GRANTED IN PART. The Motion is DENIED with respect to Count 1 of the Indictment. The court GRANTS Defendant's Motion on Count 2 of the Indictment pursuant to Federal Rule of Criminal Procedure 33. Defendant is entitled to a new trial on Count 2.

IT IS SO ORDERED.
DATED this 4th day of January, 2006.



LINDA READE
JUDGE, U. S. DISTRICT
COURT NORTHERN
DISTRICT OF IOWA

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 06-2844/2419

United States of America, Appellee,	*	
	*	Appeals from the
	*	United States
v.	*	District Court for the
	*	Northern District of
	*	Iowa.
Daniel P. Mitchell, Appellant.	*	

Submitted: January 9, 2007
Filed: February 6, 2007

Before COLLOTON and GRUENDER, Circuit Judges, and GOLDBERG,* Judge.

GOLDBERG, Judge.

Appellant Daniel P. Mitchell ("Mitchell") appeals from his conviction for violating 18 U.S.C. § 152(1). He also contends the district court erred in denying his motion to dismiss the 18 U.S.C. § 152(3) charge in his indictment. For the reasons that follow, we reverse the 18 U.S.C. § 152(1) conviction and affirm the district court's denial of the motion to dismiss.

*The Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

On May 19, 2005, Mitchell was indicted on two bankruptcy fraud counts arising from his personal bankruptcy in 2000. Specifically, he was charged with fraudulent concealment of estate property in his bankruptcy case in violation of 18 U.S.C. § 152(1) and submitting a false declaration in a bankruptcy petition in violation of 18 U.S.C. § 152(3). Both charges related to an equity interest in a closely held corporation, Wood Floors Import, Inc. ("WFI"), owned in part at one point by Mitchell. The government claimed at trial that Mitchell concealed the existence of his equity interest as well as certain income derived from the company, and also made false statements in connection with the equity interest and the income.

In early 1998, two years before filing for bankruptcy, Mitchell founded WFI. At that time, he owned 50 percent of the company, and two other owners each held a 25 percent stake. Sometime in the fall of 1998, Mitchell discussed with an attorney the possibility of transferring his share in WFI to his wife "so as to maintain a relationship with WFI" in the event he declared personal bankruptcy. Appellant's Br. 16. The government contends that this transaction never took place, or that it was "on paper only" and a sham. Appellee's Br. 19.

Mitchell, on the other hand, claims to have been motivated by a genuine desire to occupy his wife, who was suffering from depression, with a set of business activities and challenges. Mitchell maintains the transfer was properly accomplished in November 1998, though he also acknowledges that the corporate documents were not finalized until March 2000. The government argues that the transfer, if it occurred at all, happened in March 2000. In the event that the transfer was accomplished, the government contends Mitchell nevertheless had the obligation to disclose his former WFI interest when filing for bankruptcy because transfers of property within a year before the filing of a bankruptcy petition are voidable

preferential transfers that can become part of the bankruptcy estate under 11 U.S.C. § 547. See 11 U.S.C. § 547 (2000). Importantly, during 1999 and 2000, he received income from WFI in the form of payments to service a truck loan and payments to service a bank loan he owed to F&M Bank.

On July 12, 2000, Mitchell filed a voluntary petition for Chapter 7 bankruptcy. In his statement of financial affairs and schedules, Mitchell reported $35,000 in assets, including a truck valued at $16,000, and liabilities of $839,995, including the F&M Bank loan, which amounted to $160,000. He also disclosed that he would continue to receive $1000 of income per month from WFI as salary. On May 19, 2005, Mitchell was charged in a two-count indictment. A jury trial was held on August 29 to 31, 2005.

In its instructions to the jury, the district court suggested that the jury could convict Mitchell of violating § 152(1) if it found that Mitchell concealed pre-petition income that was part of the bankruptcy estate. The district court also submitted several special interrogatories to the jury on various questions. As to the § 152(1) count, an interrogatory asked the jury to indicate which information the jury had "unanimously [found] beyond a reasonable doubt that the Defendant concealed . . . ." Two check boxes appeared immediately below the interrogatory, corresponding to the allegedly concealed items: the equity interest in WFI and his pre-petition income. The jury, then, was to check the items that it unanimously found Mitchell had concealed. Mitchell moved to include a jury instruction on an "advice of counsel" defense, and the district court denied that motion.

As to the § 152(3) count, the district court posed three additional interrogatories. First, the district court posed an interrogatory similar to its § 152(1) interrogatory, instructing the jury to "place a check mark before the false representation(s) that you

unanimously find beyond a reasonable doubt that the Defendant made . . . ." Here, three check boxes appeared, because the government alleged three separate false representations. A second interrogatory appeared below, asking the jury if it "unanimously [found] beyond a reasonable doubt that one or more of the false declarations, certificate, verification and statement under penalty of perjury were 'material' matters, that is, had a natural tendency to influence, or were capable of influencing, the outcome of the bankruptcy proceeding[.]" The jury was simply asked to check "yes" or "no" in response. A final interrogatory, applicable only if the jury affirmed the materiality of the statements, asked the jury to specify which of the three statements were material under the standard articulated in the previous interrogatory. The district court had included the two interrogatories pertaining to materiality because it was uncertain at the time the case was submitted to the jury if materiality was a necessary element of a 18 U.S.C. § 152(3) charge. Indeed, the Eighth Circuit model jury instruction for 18 U.S.C. § 152(3) observed that "[t]here is some question as to whether materiality is an element of the offense of bankruptcy fraud" on account of the Supreme Court case United States v. Wells, 519 U.S. 482 (1997). Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, § 6.18.152B, at 139 n.1 (2005).

The jury returned a verdict of guilty as to both the § 152(1) charge and the § 152(3) charge. In response to the § 152(1) interrogatory, the jury found beyond a reasonable doubt that Mitchell had concealed his "total income from January 1, 1999, through about July 11, 2000." The jury did not find beyond a reasonable doubt that Mitchell had concealed his equity interest, if any, in WFI. In response to the first § 152(3) interrogatory, the jury found that Mitchell had made false statements about his "total income from January 1, 1999, through about July 11, 2000"

and "[d]ebt payments made on behalf of Defendant by [WFI] on an unsecured F&M loan[.]" In response to the materiality interrogatory, the jury checked the "no" box, annotating that it could not make a unanimous finding beyond a reasonable doubt that one or more of the false statements was material. Because the final interrogatory applied only if the jury had checked the "yes" box to the second interrogatory, the jury did not respond to it.

In synthesis, the jury convicted Mitchell of violating § 152(1) because he concealed his pre-petition income from WFI. The jury convicted Mitchell of violating § 152(3) because he made false statements about (1) his pre-petition income and (2) the debt payments WFI made on his behalf. Again, the jury was unable to find unanimously that these statements were material.

After the jury returned its verdict, Mitchell filed a motion for a new trial under Federal Rule of Criminal Procedure 33, and a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. He contended that he was entitled to a new trial because the jury did not find his false statements were material, and that the district court erred by not instructing the jury on his "advice of counsel" defense. In addition, he argued that there was insufficient evidence to support his convictions.

The district court granted the Rule 33 motion as to the § 152(3) conviction because it held that § 152(3) required a showing of materiality beyond a reasonable doubt. Since the jury had convicted Mitchell of violating § 152(3) without finding any materiality, the court observed that "the jury's verdict . . . cannot stand," and ordered a new trial. United States v. Mitchell, No. 05-50, 2006 U.S Dist. LEXIS 858, at *42 (N.D. Iowa Jan. 4, 2006). The district court denied the Rule 33 motion as to the § 152(1) count and denied the Rule 29 motion as to both counts. Mitchell then moved

to dismiss the § 152(3) charge on double jeopardy grounds; the district court denied that motion.

II.

A. 18 U.S.C. § 152(1) and Pre-Petition Income

Mitchell appeals from his 18 U.S.C. § 152(1) conviction. Mitchell's appeal alleges the district court made an error of law in interpreting 18 U.S.C. § 152(1) and 11 U.S.C. § 541(a)(6). Our review over claims of legal error is de novo. See United States v. Templeton, 378 F.3d 845, 849 (8th Cir. 2004). He contends that a defendant may not be convicted of violating 18 U.S.C. § 152(1) for failing to disclose pre- petition income, even when that income was derived from assets that eventually become part of the bankruptcy estate. He argues further that since the jury only found that he had concealed pre-petition income, his conviction must be reversed. We agree.

18 U.S.C. § 152(1) provides for up to five years imprisonment for a defendant who "knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor . . . ." 18 U.S.C. § 152(1) (2000). An essential element of a § 152(1) violation, then, is the concealment of "property belonging to the estate."

The contours of the bankruptcy estate are set forth in 11 U.S.C. § 541. Under that section, the following property, inter alia, is included in the bankruptcy estate: "(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case. . . . [and] (6) [p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(1) & (6) (2000). Stated succinctly, the bankruptcy estate

includes property interests of the debtor at the commencement of the case, as well as proceeds of the estate. See United States v. Robbins, 997 F.2d 390, 393 (8th Cir. 1993). According to the government, pre-petition income derived from assets that upon filing are included in the estate is also part of the estate as "proceeds . . . or profits of or from property of the estate" under 11 U.S.C. § 541(a)(6). The government's case was that Mitchell owned WFI, which became part of the estate, and that therefore pre-petition income derived from WFI was property of the estate as well.

This interpretation must fail. Pre-petition income can never be "of or from property of the estate" because the estate is only formed after the filing of the bankruptcy petition. See In re Markmueller, 51 F.3d 775, 776 (8th Cir. 1995). The filing of a bankruptcy petition creates a new legal entity: the bankruptcy estate. See 11 U.S.C. § 541(a)(1) ("The commencement of a case . . . creates an estate."). There is no bankruptcy estate prior to the filing of a petition, so to speak of pre-petition income as "proceeds . . . or profits" from estate property is a contradiction in terms. Instead, 11 U.S.C. § 541(a)(6) is concerned with the passive or investment income, accrued post-petition, and derived from assets that form part of the estate. See 5 Collier on Bankruptcy P 541.17 (15th ed. Rev. 2006) ("Included as property of the estate under section 541(a)(6) are all proceeds, products, offspring, rents, or profits of property of the estate, acquired after the case is commenced.") (emphasis added).

Accordingly, we hold that income received prior to the filing of a bankruptcy petition is not included as part of the bankruptcy estate. As such, no person may be convicted of violating 18 U.S.C. § 152(1) for failing to disclose such income. Mitchell's conviction must therefore be reversed.[2]

B. Double Jeopardy

Based on the jury's failure to find Mitchell's statements were material, the district court granted Mitchell's Rule 33 motion and ordered a new trial on the 18 U.S.C. § 152(3) count. Mitchell then moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion, and Mitchell now appeals.

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[2] Because we reverse Mitchell's § 152(1) conviction, we need not address his argument that the district court erred by failing to include a jury instruction on his "advice of counsel" defense. A failure to dismiss an indictment on double jeopardy grounds is subject to de novo review. See United States v. Rea, 300 F.3d 952, 956 (8th Cir. 2002).

The Double Jeopardy Clause of the Fifth Amendment "protects against a second prosecution for the same offense after acquittal." Id. at 956 (quotation marks omitted). The Supreme Court has incorporated the doctrine of issue preclusion, or collateral estoppel, into the Double Jeopardy Clause, applying it not only to acquittals, but also to final adjudications of fully litigated legal issues. See Ashe v. Swenson, 397 U.S. 436, 442-43 (1970). Therefore, double jeopardy is triggered when either (1) a jury acquits a defendant or (2) makes a factual finding beyond a reasonable doubt that would be fatal to the government's case. The burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." Dowling v. United States, 493 U.S. 342, 350 (1990).

In this case, the jury convicted Mitchell of violating 18 U.S.C. § 152(3), so there was no acquittal. Mitchell argues, though, that the jury's factual findings operate to preclude future litigation of the "materiality" issue — a crucial element in the government's case. In this case, the jury stated that it

could not "find unanimously beyond a reasonable doubt that one or more of the false declarations, certificate, verification, and statement under penalty of perjury were 'material' matters, that is, had a natural tendency to influence, or were capable of influencing, the outcome of the bankruptcy proceeding." Appellant's Br. Addendum at 2 (Verdict Form, Count II).

The response to the interrogatory does not suggest that the jury made a unanimous factual finding with respect to the materiality of the misstatements. The finding means one of two things: either (1) the jury unanimously found the statements immaterial, or (2) some jurors found the statements material and some jurors found the statements immaterial. In the former case, jeopardy would attach, and in the latter case jeopardy would not attach. The language of the interrogatory itself is not susceptible to discerning just what, specifically, the jury found; we know merely that it was unable to unanimously agree beyond a reasonable doubt that the statements were material. There is nothing in the language that suggests the jury has found beyond a reasonable doubt that the statements were immaterial.

Mindful that the burden is on the defendant to demonstrate that jeopardy has attached, see Schiro v. Farley, 510 U.S. 222, 233 (1994), we affirm the district court's denial of his motion to dismiss the indictment on the 18 U.S.C. § 152(3) charge.

For the foregoing reasons, we reverse Mitchell's 18 U.S.C. § 152(1) conviction, and affirm the district court's denial of his motion to dismiss the indictment on the 18 U.S.C. § 152(3) charge.

Instruction No. 13

The Indictment charges the defendant with making a false declaration in a bankruptcy petition. The defendant may be found guilty of this offense under one or more of the following three theories: knowingly making a false representation in a bankruptcy petition regarding (1) the defendant's ownership interest in Wood Floors Imports, (2) the defendant's total income from January 1, 1999, through about July 11, 2000, or (3) debt payments made by the defendant within ninety days of the filing of his Voluntary Petition.

Theory One:
The Defendant's Ownership Interest in Wood Floors Imports

In order to be found guilty of making a false declaration in his bankruptcy petition under Theory One, the government must prove each of the following elements beyond a reasonable doubt. The crime of making a false declaration in a bankruptcy petition has four essential elements, which are:

One, on or about July 11, 2000, a bankruptcy case was pending in the United States Bankruptcy Court for the Northern. District of Iowa, in which the defendant was the debtor;

Two, the defendant made a false declaration, certificate, verification or statement regarding a matter material to the bankruptcy proceeding by not disclosing his ownership interest in Wood Floors Imports in his Voluntary Petition (Schedule B—"Personal Property");

Three, the defendant knew the declaration, certificate, verification or statement was false when it was made; and

Four, the defendant did so with the intent to defraud.

If you unanimously find each of these essential elements of this theory of the Indictment have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this theory of the Indictment; otherwise, you must find the defendant not guilty of the crime charged under this theory.

Theory Two:
The Defendant's Total Income from January 1, 1999, through about July 11, 2000

In order to be found guilty of making a false declaration in his bankruptcy petition under Theory Two, the government must prove each of the following elements beyond a reasonable doubt. The crime of

making a false declaration in a bankruptcy petition has four essential elements, which are:

One, on or about July 11, 2000, a bankruptcy case was pending in the United States Bankruptcy Court for the Northern District of Iowa, in which the defendant was the debtor;

Two, the defendant made a false declaration, certificate, verification or statement regarding a matter material to the bankruptcy proceeding by not disclosing his total income from January 1, 1999, through about July 11, 2000, in his Voluntary Petition (Statement of Financial Affairs, page 1, Question 1---"Income from employment or operation of business and Schedule I");

Three, the defendant knew the declaration, certificate, verification or statement was false when it was made; and

Four, the defendant did so with the intent to defraud.

If you unanimously find each of these essential elements of this theory of the Indictment have been

proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this theory of the Indictment; otherwise you must find the defendant not guilty of the crime charged under this theory.

Theory Three:

Debt Payments Made by the Defendant Within Ninety Days of the Filing of his Voluntary Petition

In order to be found guilty of making a false declaration in his bankruptcy petition under Theory Three, the government must prove each of the following elements beyond a reasonable doubt. The crime of making a false declaration in a bankruptcy petition has four essential elements, which are:

One, on or about July 11, 2000, a bankruptcy case was pending in the United States Bankruptcy Court for the Northern District of Iowa, in which the defendant was the debtor;

Two, the defendant made a false declaration, certificate, verification or statement regarding a matter material to the bankruptcy proceeding by not disclosing debt payments made by the defendant within ninety days of the filing of

his Voluntary Petition (Statement of Financial Affairs, page 1, Question 3—"Payments to creditors");

Three, the defendant knew the declaration, certificate, verification or statement was false when it was made; and

Four, the defendant did so with the intent to defraud.

If you unanimously find each of these essential elements of this theory of the Indictment have been proved beyond a reasonable doubt, then you must find the defendant guilty of the crime charged under this theory of the Indictment; otherwise you must find the defendant not guilty of the crime charged under this theory.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. CR 05-0050-LRR
Plaintiff,	)	
	)	
vs.	)	VERDICT FORM
	)	
DANIEL P. MITCHELL	)	
	)	
Defendant.	)	

Theory One:
The Defendant's Ownership Interest in Wood Floors Imports

We, the Jury, unanimously find beyond a reasonable doubt the defendant, Daniel P. Mitchell, "Guilty" of the crime charged in the Indictment under Theory One.

Note: If you unanimously find the defendant not guilty of the crime charged in the Indictment under Theory One, have your foreperson write "not guilty" in the above blank space, sign and date this Verdict Form.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the crime charged in the Indictment under Theory One, have your foreperson write "guilty" in the above blank space.

Go on to consider Theory Two.

Theory Two:
The Defendant's Total Income from January 1, 1999, through about July 11, 2000

We, the Jury, unanimously find beyond a reasonable doubt the defendant, Daniel P. Mitchell, "Guilty" of the crime charged in the Indictment under Theory Two.

Note: If you unanimously find the defendant not guilty of the crime charged in the Indictment under Theory Two, have your foreperson write "not guilty" in the above blank space, sign and date this Verdict Form.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the crime charged in the Indictment under Theory Two, have your foreperson write "guilty" in the above blank space.

Go on to consider Theory Three.

Theory Three:
Debt Payments Made by the Defendant Within Ninety Days of the Filing of his Voluntary Petition

We, the Jury, unanimously find beyond a reasonable doubt the defendant, Daniel P. Mitchell, "Guilty" of the crime charged in the Indictment under Theory Three.

Note: If you unanimously find the defendant not guilty of the crime charged in the Indictment under Theory Three, have your foreperson write "not guilty" in the above blank space, sign and date this Verdict Form.

If you unanimously and beyond a reasonable doubt find the defendant guilty of the crime charged in the Indictment under Theory Three, have your foreperson write "guilty" in the above blank space and sign and date this verdict form.

/s
FOREPERSON

5/2/07
DATE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3136

UNITED STATES OF AMERICA,)		
Appellee,	)	Appeal from the
	)	United States
v.	)	District Court for
	)	The Northern
	)	District of Iowa
DANIEL P. MITCHELL,	)	
Appellant	)	

Submitted: March 11, 2008
Filed: June 10, 2008

Before RILEY, GRUENDER, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

In August 2005, Daniel P. Mitchell was convicted of knowingly and fraudulently making a false statement under penalty of perjury in relation to a bankruptcy case, in violation of 18 U.S.C. § 152(3). The district court[1] ordered a new trial because the jury

[1] The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa. Appellant. *

did not unanimously find that the false statements were material. The district court denied Mitchell's motion to dismiss the indictment on double jeopardy grounds, and we affirmed that decision. United States v. Mitchell, 476 F.3d 539 (8th Cir. 2007).

At a second trial, a jury again found Mitchell guilty of violating section 152(3). He appeals once again, raising issues of double jeopardy and sufficiency of the evidence. Our review of the evidence is in the light most favorable to the verdict, accepting all reasonable inferences that support the verdict, and resolving all evidentiary conflicts in the Government's favor. See United States v. Johnson, 450 F.3d 366, 372 (8th Cir. 2006), cert. denied, 127 S. Ct. 1009 (2007). We affirm the conviction.

I.

Mitchell filed a voluntary petition for Chapter 7 bankruptcy protection on July 12, 2000. In his schedules, he reported $35,000 in assets, including a truck worth $16,000. He claimed $839,995 in liabilities, including debt of $160,000 to F&M Bank, a truck loan of $15,525, and $96,400 in priority claims from past-due taxes. He declared that his only income was $1,000 per month as a laborer for Wood Floors Import. In his statement of financial affairs, he stated that in the two years preceding July 12, 2000, he did not own any business and was not an officer, director, or executive of any business. He reported that he had not made any payments of more than $600 to any

creditor within 90 days before the petition. When Mitchell signed
the schedules and statement, he declared "under penalty of perjury" that the schedules and statement were true and correct.

Mitchell founded Wood Floors Import Distributor, L.C., (WFI) in January of 1998. WFI imported bamboo flooring from China and distributed it throughout the United States. Mitchell's wife Kathy did data entry for the company but did not have an ownership interest. After the company was formed, Mitchell discussed with his attorneys the possibility of transferring ownership of WFI to Kathy so that it would not be affected by the personal bankruptcy he was contemplating. Kathy knew nothing about this plan until March of 2000. That month, Mitchell directed her to type meeting minutes reflecting that he gave his 75% ownership interest to her on November 20, 1998. Mitchell explained that the company had to be "out of his name for so long of a period so that they couldn't attach to it."

The minutes said that Mitchell would remain as president of the company, and Kathy would hold all other titles. She sent the minutes to Mitchell's corporate attorney, who on March 30, 2000, prepared certificates of ownership to be signed and delivered. Despite the new paperwork, nothing changed in the operation of WFI. Mitchell continued to run the business; Kathy's responsibilities were not increased. She did not consider herself to have authority to pay WFI's bills, and only signed checks as Mitchell directed. On paper, Kathy made $10,000 per month,

but Mitchell treated the money as his own and told her how to spend it.

In late 2002, Kathy's relationship to Mitchell and role in WFI changed. On October 29, 2002, she filed for divorce. She began to fear that, because she was the owner of WFI "on paper," she would be liable for anything that the company did. On the advice of her attorney, she fired Mitchell from WFI and denied him access to its assets. She filed a Chapter 7 bankruptcy petition for the company on December 19, 2002.

Upset at the way he was treated, Mitchell contacted Assistant United States Trustee Janet Reasoner in January of 2003 to accuse Kathy of bankruptcy fraud. He told Reasoner that he had formed WFI in 1998 and had transferred it to Kathy three years before. Instead of discussing the fraud accusations, however, Mitchell explained that he wanted to be allowed to liquidate the inventory in WFI's bankruptcy estate. He provided two three-ring binders containing information about WFI and its business plan. Among the documents was an amortization schedule showing WFI's payments on Mitchell's loan from F&M Bank, with an adhesive note on it that said, "This was income to Dan. Not a loan from the co. to pay a loan." There was also a copy of WFI's list of payments to insiders, which showed that Mitchell was paid approximately $425 per week. Attached to the list was another adhesive note that said, "Being the Originator Starter of the Co. . . . 425.00 take home every 2 weeks Ha! Ha!" After the meeting, Mitchell's lawyer filed a motion on his behalf

asking the bankruptcy court to compel the Chapter 7 trustee to hire him to liquidate the inventory.

As she prepared to resist Mitchell's motion, Reasoner learned that he had filed a personal bankruptcy in 2000. She reviewed the filings from that case and became suspicious that Mitchell had concealed his interest in WFI or failed to disclose that he transferred the business. At the hearing on Mitchell's motion, Reasoner planned to gather additional information that she might use for a criminal referral.

The bankruptcy court held the hearing on March 4, 2003. Mitchell testified in support of his motion. In response to questions from WFI's attorney, Mitchell admitted that in July of 2000 he "was the President and CEO [of WFI] according to Kathy's records," but identified himself as a laborer on his bankruptcy schedules. He claimed that he "had to . . . [b]ecause of tax reasons and my wife . . . pretty much didn't want to have the IRS connecting this company with the other company."[2] When Reasoner asked him about the amortization schedule, he confirmed that from March 27, 2000 to October 7, 2002, he directed WFI to pay F&M Bank more than $44,000 on the debt that he personally owed, and that the payments were income to
him.

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[2] Mitchell listed the companies Wood Floors, Inc., Eastern Iowa Granite & Marble, Inc., and Tile Crafters in his personal bankruptcy.

> The most telling part of Mitchell's testimony, however, was his reaction to Reasoner's suggestion that he was a creditor of WFI:
>
> I feel as an owner. I've never lost that position. Just because a piece of paper takes it away from me does not change the fact that I started this, I ran it, I put 65 hours a week in this company.

Ten days later, Reasoner made a criminal referral to the United States Attorney regarding Mitchell's 2000 personal bankruptcy.

II.

A grand jury indicted Mitchell on charges that he knowingly and fraudulently concealed his ownership interest in WFI and total income from January 1, 1999 through July 11, 2000 in connection with a bankruptcy case, in violation of 18 U.S.C. § 152(1) (Count 1); and that he knowingly and fraudulently submitted a false declaration, certificate, verification, and statement under penalty of perjury in relation to a bankruptcy case, in violation of 18 U.S.C. § 152(3) (Count 2). For Count 2, the Government's

three theories were that Mitchell failed to disclose: his ownership interest in WFI; his total income from January 1, 1999 through July 11, 2000; and debt payments made on his behalf by WFI on the F&M loan. The district court held a jury trial in August of 2005. The jury found Mitchell guilty of Count 1. In interrogatories, the jury specified that it unanimously found that Mitchell fraudulently concealed his income, but did not unanimously find that he concealed his ownership interest in WFI. On Count 2, the jury found Mitchell guilty, specifically finding in a special interrogatory that he made false statements about his income and debt payments made on his behalf. The jury did not unanimously find that he failed to disclose his ownership interest in WFI. In response to the special interrogatory of whether the Count 2 statements were "material" matters, the jury answered "No." Mitchell filed a motion for a judgment of acquittal and a motion for a new trial.

The court granted his motion for a new trial on Count 2, but denied it with respect to Count 1. The court reasoned that Mitchell was entitled to a new trial on Count 2 because the crime requires a showing of materiality beyond a reasonable doubt and the jury did not unanimously find that any false statement was material. The motion for a judgment of acquittal was denied on both counts, as was Mitchell's subsequent motion to dismiss the Count 2 indictment on double jeopardy grounds.

Mitchell appealed his conviction on Count 1 and the denial of his motion to dismiss Count 2 on double jeopardy grounds. We reversed his conviction on Count 1, but affirmed the denial of his motion to dismiss

Count 2. Mitchell, 476 F.3d at 544-45. The district court's order for a new trial on Count 2 remained in effect.

III.

The second trial began with the testimony of Kathy Bigelow, Mitchell's ex-wife. She testified that she did not know anything about Mitchell's desire to transfer WFI to her until March of 2000. She said that on March 16, 2000 she typed the meeting minutes that described the supposed transfer of ownership, but Mitchell told her to date them November 20, 1998. Then she explained that Mitchell directed how she was to spend WFI's funds. Kathy testified that in 2000, when Mitchell listed his position as laborer, he was in fact the owner, operator, and president of WFI.

Sheryl Schnittjer was the bankruptcy panel trustee assigned to Mitchell's case in 2000. She gave an overview of the petition, statement of financial affairs, and schedules that Mitchell filed in the bankruptcy court. She confirmed that the documents made no mention of the WFI transfer, his position as an executive in the company, or WFI's payments on his debts. Schnittjer further stated that Mitchell did not bring up any of those matters at the meeting of creditors. If he had disclosed those facts in his documents, she said that she would have made further inquiry as to their legitimacy. She testified that under state law, she could have investigated transfers up to five years back because there were outstanding government debts.

The Government called Assistant United States Trustee Janet Reasoner, who recounted her meeting

with Mitchell and his admissions at the bankruptcy court hearing. Audio excerpts of Mitchell's testimony from that hearing were played for the jury. Reasoner testified that if the information Mitchell gave her had been disclosed in his 2000 bankruptcy, the trustee undoubtedly would have made inquiry as to Mitchell's ownership of WFI and the validity of the transfer. According to Reasoner, if the transfer had been made within a year of the filing, the trustee could have liquidated Mitchell's interest in WFI and distributed it to the creditors in Mitchell's bankruptcy.

Mitchell introduced the testimony of WFI's accountant, his lawyer for the 2000 bankruptcy, and a neighbor. The accountant provided information about WFI's tax returns, which showed that Kathy was the owner of WFI in 1998. Mitchell's bankruptcy lawyer acknowledged that Mitchell did not provide him with information about the transfer of WFI, the company's payments on Mitchell's debts, or Mitchell's position as WFI's president. The lawyer opined, however, that a transfer in 1998 would not have been voidable. Mitchell's neighbor testified that Mitchell talked to him about transferring WFI to Kathy in 1998, and that Kathy was in charge of WFI's money.

In the closing argument, Mitchell depicted his prosecution as the product of a nasty divorce. He attacked Kathy's credibility. He suggested that the Assistant United States Trustee Janet Reasoner was biased against him because Reasoner's sister-in-law, Carroll Reasoner, was one of Kathy's lawyers. According to Mitchell, Kathy was the owner of WFI, but the parties had a family agreement about how it was to be run. The last part of his argument focused

heavily on the materiality of the alleged false statements.

The district court submitted a different verdict form to the jury than it had during the first trial. As to each of the three theories, the verdict form asked the jury to make a finding of guilty or not guilty. The instructions provided a definition of materiality and gave materiality as an element of the offense, but there was not a special interrogatory on the topic.

The jury found Mitchell guilty as to each of the three theories. Mitchell moved for acquittal, arrest of judgment, and a new trial. The court upheld the verdict as supported by the evidence and not barred by the Double Jeopardy Clause. It rejected his argument that he was entitled to an advice of counsel defense. Because it found that its rulings were not erroneous, the court denied a new trial.

IV.

Mitchell raises six points on this appeal. For his first and third points, he argues that he should have been acquitted based on the jury's findings in the first trial. In his second and fourth points, he argues that the Government's evidence was not sufficient to prove materiality or his ownership of WFI at the time he filed his bankruptcy petition. He further argues, in points five and six, that his answers to the questions in the bankruptcy documents were objectively reasonable, and that the district court should have submitted an instruction on the advice of counsel defense.

For the reasons given below, we affirm the district court's judgment.

A.

In his first and third points, Mitchell offers a renewal of the double jeopardy issue that was before us in the first appeal. See Mitchell, 476 F.3d at 544-45. As we discussed in that decision, the jury in the first trial did not unanimously find that his false statements were material. Mitchell also points out that the first jury did not unanimously find that there was a false declaration that he did not have an ownership interest in WFI. He argues that in the first appeal, we did not consider whether there is a presumption that a jury's verdict is unanimous or whether the district court's decision violated principles of fundamental fairness.

In the first appeal, we reasoned that the language of the third interrogatory was "not susceptible to discerning just what, specifically, the jury found; we know merely that it was unable to unanimously agree beyond a reasonable doubt that the statements were material." Id. at 545. By the same logic, all we know from the second interrogatory is that the jury was not able to unanimously agree that Mitchell made a false declaration as to his ownership interest in WFI. The language does not suggest that the jury unanimously found a reasonable doubt on this issue. We will adhere to a decision in a prior appeal of the same case unless a party introduces evidence that is substantially different, or the prior decision is clearly erroneous and manifestly unjust. United States

v. Bartsh, 69 F.3d 864, 866 (8th Cir. 1995). Mitchell's arguments may be slightly different, but the evidence is not. Nor has he persuaded us that our prior decision was clearly erroneous or manifestly unjust. We decline to revisit the double jeopardy issue. See United States v. Washington, 197 F.3d 1214, 1216 (8th Cir. 1999).

B.

The second and fourth points in Mitchell's brief relate to the sufficiency of the Government's evidence to sustain the conviction. He argues that there was insufficient evidence that the false statements were material, and insufficient evidence to support the first theory, that Mitchell owned WFI. We review the sufficiency of the evidence de novo, and will reverse only if no reasonable jury could have found the defendant guilty. Johnson, 450 F.3d at 372. Mitchell is guilty of Count 2 if he "knowingly and fraudulently ma[de] a false declaration, certificate, verification, or statement under penalty of perjury" in or in relation to any bankruptcy case. 18 U.S.C. § 152(3). The word "material" appears nowhere in the statute. We have assumed that the false statement must be made with regard to a material matter, see United States v. Yagow, 953 F.2d 427, 432 n.2 (8th Cir. 1992), but Mitchell does not cite a case in which we have reversed a section 152 conviction because there lacked evidence of materiality. Interpreting a similar criminal statute, the Supreme Court has since held that materiality is not an element of the crime of "knowingly making any false statement or report . . . for the purpose of influencing in any way the action" of a federally

insured bank. United States v. Wells, 519 U.S. 482, 490 (1997) (interpreting 18 U.S.C. § 1014). The Court did not believe that an unqualified reading of section 1014 would pose the "risk of criminalizing so much conduct as to suggest that Congress meant something short of the straightforward reading." Id. at 498-99. The knowledge element and the term "for the purpose of influencing" was enough to narrow the class of criminal conduct in the same manner as an implied materiality requirement. Id. at 499. Likewise, we believe that the term "knowingly and fraudulently" is enough to limit the class of section 152(3) violations such that a materiality requirement should not be implied. But even if materiality was required, there was plenty of evidence to prove that Mitchell's false statements would meet our definition of "material." We have noted that materiality is "'readily established' and does not require a showing that the creditors were harmed by the false statements." Yagow, 953 F.2d at 433 (quoting United States v. Phillips, 606 F.2d 884, 887 (9th Cir. 1979)). Because they are pertinent to his financial transactions, Mitchell's statements relating to his employment and income are material. See id. at 433. Statements that may impede an investigation into the debtor's financial history are also material. Phillips, 606 F.2d at 887. To the extent that Mitchell's false statements were not in themselves material, the testimony of Sheryl Schnittjer and Janet Reasoner was adequate to establish materiality.

For his argument that there was no proof he owned WFI, Mitchell asserts that Kathy's testimony is inconsistent with the income tax returns and her subsequent conduct in assuming ownership of the

company and firing him. It is the task of the jury to evaluate a witness's credibility; attacks on the sufficiency of the evidence based on the witnesses' credibility are rarely an appropriate ground for reversal. United States v. McKay, 431 F.3d 1085, 1094 (8th Cir. 2005). We would reject the evidence only if it asserted facts straying into the realm of impossibility. See United States v. Grover, 511 F.3d 779, 782 (8th Cir. 2007). Although Kathy's exercise of control over WFI may seem inconsistent with Mitchell's ownership, the situation is consistent with longstanding principles of property law. It is well settled that a person who fraudulently conveys property to avoid the reach of creditors is at the grantee's mercy as to whether he will ever get his property back. See Weir v. Day, 10 N.W. 304, 305-06 (Iowa 1881); Holliday v.Holliday, 10 Iowa 200, 201 (1859). This is because the "clean hands" maxim bars either party to the conveyance from obtaining affirmative judicial relief to enforce the arrangement. Opperman v. M & I Dehy, Inc., 644 N.W.2d 1, 7 (Iowa 2002); Holliday, 10 Iowa at 201. Put another way, after a fraudulent conveyance the grantee may hold the property in a secret trust for the benefit of the grantor, but the courts are unwilling as a matter of policy to enforce that trust, except for the benefit of creditors. See Weir, 10 N.W. at 305. So, regardless of whether Mitchell had a judicial remedy to enforce his interest, both Kathy's testimony and Mitchell's admissions at the bankruptcy hearing established that Mitchell was the beneficial owner of WFI at the time he filed his bankruptcy petition.

C.

The fifth and sixth points of Mitchell's brief provide arguments in support of overturning the jury's findings of guilt on the second and third theories of Count 2. In this case, the Government sought to prove that Mitchell violated section 152(3) by specifying three separate means, as permitted by Rule 7(c)(1) of the Federal Rules of Criminal Procedure. Proof of any one of the means will sustain the conviction. See United States v. Platter, 514 F.3d 782, 786-87 (8th Cir. 2008). As discussed above, there was sufficient evidence to sustain Mitchell's conviction on the theory that Mitchell violated section 152(3) by not disclosing his ownership in WFI. Thus, we need not measure the proof in support of the second and third theories.

V.

We affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-3136
United States,

Appellee

v.

Daniel P. Mitchell,

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids
(1:05-cr-00050-LRR-1)

ORDER

The petition for rehearing en banc is denied.
The petition for rehearing by the panel is also denied.

July 30, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans